SUPREME COURT, U.S.
FILED

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM G. PIERCE, P.E.,
Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Submitted by:

William G. Pierce, P.E.
pro se
3011 Hampton Court
Maineville, Ohio 45039
(513) 677-5334

46 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Federal Rule of Civil Procedure 12(h)(3) allows a defendant to raise a post judgment challenge of the court's subject matter jurisdiction.

II.

Whether Sections 254 and 259 of the Portal-to-Portal Act are jurisdictional in nature, and the "plain language" phrases "no employer shall be subject to any liability or punishment" and "is a bar to the action" as stated in the statute, limits a court's subject matter jurisdiction and precludes further proceedings against the defendant.

III.

Whether fraud committed by an officer of the court is covered under Rule 60(b)(3) or 60(b)(6) of the Federal Rules of Civil Procedure.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals were the United States Department of Labor and William G. Pierce, P.E..

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William G. Pierce ("Pierce") respectfully requests that the Court grant the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Sixth Circuit. As discussed below, a review of the issues presented in this case is necessary to ensure the rightful application of the Federal Rules of Civil Procedure and the Portal to Portal Act of 1947.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is an unpublished decision and is set forth in the Appendix to the Petition ("Pet.App.") A at A1. The Final Judgment by the United States District Court for the Western Division of the Southern District of Ohio is set forth in Pet. App. B at B1. The Findings of Fact, Conclusions of Law, Decision and Order of the United States District Court for the Western Division of the Southern District of Ohio is set forth in Pet. App. C at C1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 9, 1997. Pet. App. A. A Motion for Reconsideration was denied by order of the court dated July 18, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENTS, STATUTE(S) AND REGULATION(S) INVOLVED

The constitutional amendments, statutory and regulatory provisions involved in this case are:

Federal Rules of Civil Procedure
Rules No. 12(h)(3), 60(b)(4), and 60(b)(6)

Portal to Portal Act of 1947
(29 U.S.C. §251 *et seq.*)

STATEMENT OF THE CASE

Petitioner seeks review of a decision and judgment of the United States Court of Appeals for the Sixth Circuit that upheld the decision by the district court when it denied Pierce's Motion to Vacate Judgment and Dismiss for Lack of Subject Matter Jurisdiction. The district court's decision in this action was that Pierce's motion was untimely filed and therefore procedurally defective. In addition to affirming the district court's decision that the motion was untimely filed, the 6th Circuit failed to follow precedent and also decided that the Portal-to-Portal Act did not involve subject matter jurisdictional issues, but was strictly a defense that was available to Pierce.

A. Factual Background

Petitioner Pierce is the sole owner of a thirteen year old consulting engineering firm that had 25 employees in three geographical areas in the mid-west region of the country. All of the firm's work involves contracts with private industries manufacturing consumer products and fine chemicals. The employees in question are considered by Pierce to be salaried employees exempt from the minimum wage and overtime provisions of the FLSA by virtue of the exemptions established for managerial and professional employees. The DOL has stated that the backgrounds and job duties of the employees meet the regulatory requirements for such exempt status.

In addition to a complete range of company paid benefits for the employee, spouse, and children, Pierce also had a flextime policy to allow his employees the opportunity to set their own schedule to meet personal and family needs. With the offices opened twelve hours a day for ten days in a normal two week pay period, the employee was able to

establish his/her own schedule as long as it did not negatively impact on the needs of the client or co-workers.

Each employee, for billing purposes, was required to complete an individual time sheet in order to account for their time. The time sheets were kept as a project record and appropriately charged to the client. As a matter of internal record keeping, the employees were instructed to account for their time in one of four categories: by project; leave (vacation, holiday, sick), miscellaneous (jury duty, military leave, bereavement, family medical emergencies, etc.), and "office hours" (if no project work was available.)

Inherent with the flextime policy was the expectation that the employee would manage their time in a professional manner and work the hours commensurate with their agreed upon salary. Should personal and/or family needs require time away from work, the employee did not need permission from any manager to leave early or arrive late, nor when to make up any time that may have been missed. If so desired, they had the option to charge such absences to personal leave accounts rather than make the time up at a later date or receive a reduction in pay -- the option was the employee's.

As a matter of fairness to all the salaried exempt employees, overtime hours worked by the employees provided additional compensation at a rate equal to their yearly salary divided by 2080 hours. Since overtime hours were sporadic, dependent on specific phases of a project, and billable to the client, the additional payments were made to the employees so that the "wealth" was shared.

During the course of the audit and subsequent review of the records, it was found that approximately 105 hours out of a total of nearly 70,000 effort hours worked were deducted from employees pay for time the employees chose

to leave work and not make up the time or charge to their absences for vacation leave. The figure represents approximately $3,100 out of a payroll that approached $1,500,000. During the same period, Pierce provided non-required compensation totaling over $40,000 to the same group of salaried-exempt employees for the extra time spent on the job, even though such compensation was not legally required for salaried employees. The 105 hours the DOL was of the opinion should not have been deducted, represents 0.15% of the total hours worked during the audit period, while the $3,100 the deducted hours represented amounted to 0.21% of the approximate payroll. In comparison, the $40,000 in extra compensation paid to the salaried employees represented 2.7% of the approximate payroll for the same audited period.[1]

B. Procedural Background

On January 10, 1989, the Secretary commenced a lawsuit against Pierce alleging that certain employees of Pierce, during the period from June 1, 1986, to May 30, 1988, were not exempt from the overtime provisions of the FLSA and were therefore entitled to additional overtime payments. The determination was based on the Department's new interpretation of the "salary basis" test. Pierce filed a response denying that it had violated the overtime provisions of the Act, asserting that the employees in question were exempt administrative and/or professional employees pursuant to 29 U.S.C. §213 and the applicable regulations found at 29 C.F.R. §541.

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[1] In other words, Pierce paid his employees in extra compensation ten times the amount of money the DOL was of the opinion should not have been deducted, even though the employee was not willing to work when work was available, and chose not to charge the hours to their annual leave account.

On March 25, 1992, the United States District Court for the Southern District of Ohio, Western Division, issued "Findings of Fact, Conclusions of Law, Decision and Order", that the employees were determined to be exempt from the overtime payment provision of the Act subject to the conditions that (1) Pierce reimburse the employees in question for the deductions made, and (2) Pierce promise to comply with the Act in the future. Magistrate Judge Sherman found that the "window of correction" should be made available to Pierce since deductions had never been made due to lack of work, but only when the employees were voluntarily absent for personal reasons, and that Pierce was currently in compliance and had promised to comply in the future.

On February 9, 1993, the court reversed its decision that Pierce's employees were exempt from the overtime provisions of the FLSA because Pierce had not complied with the order to reimburse the employees for the deductions that were made.[2] The subsequent Judgment was that Pierce's

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[2] The ultimate reversal of the magistrate judge's decision that Pierce's employees would be covered as exempt employees through the "window of correction" was due solely to Pierce's inability to comply with the order to reimburse employees for the deducted hours. In no way did the financial situation in 1992 reflect the manner in which the employees where treated and compensated in the June 1986 to May 1988 audited period covered by the district trial: the recession of the early 1990's and the distraction and disruption caused by this litigation had taken its toll.

Pierce requested additional time in order to sell his family residence and raise the funds necessary to comply with the magistrate judge's order to reimburse the employees for the deducted hours. In an effort to demonstrate the inability to pay in the Fall of 1992, Pierce offered to "open the books" to an auditor of the court to substantiate his explanation of non-compliance. In the appeal, exhibits were filed that included cover sheets of the foreclosure proceedings on Pierce's family home, Cincinnati office building, eviction notice of the business's Louisville office, and repossession of the office equipment and furniture

employees were not exempt from the overtime provisions of the FLSA, and that Pierce must pay the additional overtime amounts along with interest and court costs.

On March 9, 1993, Pierce, proceeding *pro se*, filed an appeal from the District Court's Final judgment, as did the Secretary on April 12, 1993, when the Department filed a cross-appeal. The United States Court of Appeals for the Sixth Circuit, issued an unpublished decision affirming the district court's decision and rejected the arguments raised by both Pierce and the Secretary. The court relied upon *Martin v. Malcolm Pirnie, Inc.* 949 F.2d 611 (2nd. Cir. 1991), wherein the application of the "window of correction" was rejected along with the argument for the "plain meaning" of the regulations.

On January 4, 1995, Pierce filed a motion for a Rehearing En Banc. That request was denied on February 15, 1995.

On May 9, 1995, Pierce filed a Petition for a Writ of Certiorari with the United States Supreme Court. The request was denied on October 2, 1995.

On January 21, 1996, Pierce filed a motion with the United States District Court for the Southern District of Ohio, Western Division to Vacate Judgment and Dismiss for Lack of Subject Matter Jurisdiction. The motion was filed pursuant to Federal Rules of Civil Procedure 12(b)(1) Lack of Subject Matter Jurisdiction, 12(h)(3) Preservation of Certain Defenses, 60(b)(4) Relief from Judgment, 60(b)(6) Relief for Any Other Reason. Pierce contended that the District Court did not have the subject matter jurisdiction

from both offices, in an effort to demonstrate the inability to pay and the financial devastation that resulted from the litigation initiated by the Secretary.

over the proceedings *ab initio*[3] due to the jurisdictional limits placed on the courts by Congress in the Portal -to-Portal Act of 1947, and that the original judgment must be voided.

On March 21, 1996, the court acknowledged the Appellant's *pro se* status, and as such stated that "the motion is construed liberally and in [his] favor"; yet ruled the motion was untimely filed and therefore was procedurally defective. Furthermore, the court ruled that had it considered the merits of the motion, it found no justifiable grounds for voiding the judgment due to lack of subject matter jurisdiction. Pierce filed a motion to Reconsider on March 31, 1996 from which the court upheld its original order.

On June 26, 1996, Pierce filed an appeal from the District Court's Final Judgment. The United States Court of Appeals for the Sixth Circuit issued an unpublished decision on May 9, 1997, affirming the district court's decision and reject the arguments raised by Pierce.

The Sixth Circuit opinion upheld the lower court's position that a motion to dismiss under Rule 12 must be decided before or at the time of trial. Further, the court ruled Section 259 of the Portal Act created defenses to liability rather than limitations on the jurisdiction of the courts as Pierce has pleaded.

On May 21, 1997, Pierce filed a Motion to Reconsider and cited numerous circuit decisions, including a prior one from the Sixth Circuit, stating that post judgment motions under Rule 12 must be given due consideration. The

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[3] Pierce filed the motion within three months after receiving a copy of a letter from the DOL, directed to his Congressman, in which the Department acknowledged the bar to jurisdiction established by the Portal-to-Portal Act of 1947, and thus conceding the court's lack of subject matter jurisdiction.

motion also pointed to numerous rulings addressing the jurisdictional nature of the Portal-to-Portal Act.

The Motion to Reconsider was denied by the court on July 18, 1997.

REASONS FOR GRANTING THE WRIT

I

Whether the Federal Rule of Civil Procedure 12(h)(3) allows a defendant to raise a post judgment challenge of the court's subject matter jurisdiction.

In the lower court's original decision filed May 9, 1997, the court acknowledged that Pierce's Motion to Vacate Judgment and Dismiss for Lack of Subject Matter Jurisdiction was filed under Federal Rules of Civil Procedure 12(b)(1), 12(h)(3), 60(b)(4), and 60(b)(6). The court then quickly dismissed the motion under Rule 12 by stating that: "A motion to dismiss under Rule 12 must be decided before or at the time of trial." In the court's decision covering Pierce's Motion to Reconsider it was further stated that: " . . . Pierce could not rely on Rule 12(b)(1) because his motion to vacate had been filed after the underlying judgment." Both decisions fail to address the provisions of Rule 12(h)(3) wherein it states: "*Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added).

The ruling of the court below is contrary to the "plain language" of the rules of the court, a prior decision of their own, and that of numerous circuits. In *Moore's Federal Practice* the issue is discussed:

> Furthermore, under subdivision (h)(3) the defense of lack of subject matter jurisdiction cannot be waived. A party may always suggest that the court lacks jurisdiction of the subject mater. The parties can not agree to waive the defense . . . *2a Moore's Federal Practice* ¶ 12.23 2nd (1978) p. 12-226 to 12-242.

In a 6th Circuit decision written by Circuit Judge Boggs[4], it was stated that "*whenever*" includes a defendant's post-judgment motion and that the court must entertain such motion under Rule 12(h)(3):

> Because [Defendant] raised the issue of jurisdiction only after judgment had been entered in the district court, the question also arises whether this court must address the issue at all. It appears that we must. The general practice among federal courts has been to permit any party to challenge (or for the court to question sua sponte) the existence of subject-matter jurisdiction at any time in the proceedings. The language of Fed.R.Civ.P. 12(h)(3) suggests that courts have a positive duty to under take the jurisdictional inquiry: "*Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." *Von Dunser v. Aronoff*, 915 F.2d 1071, 1074 (6th Cir. 1990). (emphasis original.)

In addition to the lower court's decision in Pierce being in conflict with its own previous rulings, the court has also ruled in conflict with numerous other circuits. The 10th Circuit Court of Appeals, along with others (see *Dunton v. County of Suffolk*, 729 F.2d 69 (2nd Cir. 1984), *Hayes v. Gulf Oil Corp.*, 821 F.2d 285 (5th Cir. 1987), *Casio, Inc. v. SM&R Co.*, 755 F.2d 528 (7th Cir. 1985), and *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980)), completely agree. In *Basco v. Utah Power & Light Co.*, 495 F.2d 906 (10th Cir.

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[4] Circuit Judge Boggs was one of the judges on the panel reviewing the district court's decision in the Pierce case.

1974), the court held: "[w]e are mindful that it appears unjust to allow a defendant to make an attack on jurisdictional grounds after a final judgment has been entered, but an opposite result would unlawfully expand the jurisdiction of the federal courts by judicial interpretation." *Id* at p. 910.

In affirming the lower court's judgment, the position taken by the lower court was: "A motion to dismiss under Rule 12 must be decided before or at the time of trial. . . . Therefore, we construe Pierce's motion solely as a motion for relief from judgment under Rule 60(b)." The 6th Circuit's prior decision in *Von Dunser v. Aronoff* and similar decisions made by the numerous circuits listed above certainly point to the fact the lower court's affirmation of the district court's ruling in the Pierce case is in error and that Pierce's motion must be considered under Fed. R. Civ. P. 12(h)(3) - lack of subject matter jurisdiction.

II.

Whether Sections 254 and 259 of the Portal-to-Portal Act are jurisdictional in nature, and the "plain language" phrases "no employer shall be subject to any liability or punishment" and "is a bar to the action" as stated in the statute, limits a court's subject matter jurisdiction and precludes further proceedings against the defendant.

In the affirming the district court's decision and in denying the Motion for Reconsideration, the lower court takes the position that 29 U.S.C. §§ 254 and 259 are merely defenses and are not jurisdictional limitations. The position is in conflict with the "plain language" of the statute and its own prior decisions, as well as those of other circuits.

The stated purpose of Congress, while writing and enacting the Portal-to-Portal Act (hereinafter the Act), was:

> (b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to **relieve and protect** interstate commerce from the practices which burden and obstruct it; ... and (3) to **define and limit the jurisdiction of the courts**. (emphasis added).

Section 259 of the Act defines specific activities that are to be exempt from the overtime compensation requirements of the Fair Labor Standards Act (hereinafter the FLSA) and addresses the courts' responsibilities. It states in part:

> ***[N]o employer shall be subject to any liability or punishment*** under the Fair Labor Standards Act of 1938 ... on account of the failure of such employer ... to pay an employee overtime compensation, for or on account of any of the following activities of such employee --
>
> (2) ***activities which are preliminary to or postliminary to said principal activity or activities, which occur*** either prior to the time on any particular workday at which such employee commences, or ***subsequent to the time on any particular workday at which he ceases, such principal activity*** or activities. *29 U.S.C. 251 Part III* Future Claims - Section 4 (emphasis added)

(and)

> (d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, ... ***in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities*** described in subsection (a) of this section, ***there shall be counted all the time, but only that time, during which the employee engages in any such activity which is compensable*** within the meaning of subsections (b) and (c) of this section[5]. (emphasis added)

The claim against Pierce, in this action, involves time when Pierces employees left work on their own accord and were engaged in the pursuits of playing golf, flying model airplanes, fishing, and in a few instances involved in personal family matters. Pierce has always maintained that such activities were "preliminary/postliminary" activities and did

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[5] Subsection (b) and (c) provide:

(b) Liability of employer

... an activity which was compensable by either --

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargining representative and his employer; or (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Compensable activity

For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

not represent the employees' "principal activities.[6] Counsel for the Secretary has agreed:

> In fact, the activities for which the defendants now seek to avoid liability were performed away from and are totally unrelated to the employee's principle work. (*Pl. Memorandum* p.5, to the district court dated February 20, 1996)

The D.C. Court of Appeals ruled that the Act's §254 would "preclude" an employers wage "liability and punishment" for compensation covering time when an employee was walking from the front gate of his/her employer to an assignment board and then to his work location. (*see Carter v. Panama Canal Company,* 463 F.2d 1289, 1294 (DC Cir. 1972)). Notice the court's decision was not that it would defeat the appellant's suit but rather preclude it in the first place by taking the position that locomotive operators were not engaged in "principal

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[6] Interpretive case law, including an opinion by the 6th Circuit, has defined "preliminary and postliminary activities" as those "predominantly ... spent in [employees] own interest." *See Jackson v. Air Reduction Co.*, 402 F.2d 521, 523 (6th Cir. 1968). "No benefit may inure to the company." *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283, 287 (5th Cir. 1969). The activities must be undertaken "for [employees] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer." *Mitchell v. Southeastern Carbon Company*, 228 F.2d 934 (5th Cir. 1955) On the other hand, in a DOL Interpretive Bulletin, the Secretary states that "[t]he 'principle' activities referred to in the statute are activities which the employee is 'employed to perform' ... the legislative history ... indicates that Congress intended the words 'principle activities' to be construed liberally in light of the foregoing principles to include any work of consequence performed for an employer ...." *29 C.F.R. §790.8(a).*

activities" while checking assignment boards and walking to their respective locomotives. If the locomotive operators, who were even on the employer's premises, were not engaged in "principal activities"; how can Pierce's employees, who were on the fairway playing golf or by the lake side fishing -- and certainly not on the premises -- be engaged in anything remotely associated with their "principal activities"?

It is not disputed §254 "precludes" a complaint for activities not involving "principal activities". For if, as the statute mandates, "no employer shall be subject to any liability or punishment" there are no further decisions to be made by the court. The Act does not allow for a "degree" of liability and/or punishment to be determined by the court. Rather it emphatically states "no ... liability or punishment" and thus removes the cause of action for which relief is presented, and no relief may be granted for compensation covering non-principal activities. Therefore, the court has lost the subject matter and has no further jurisdiction.

Section 259 of the Act also relates to "Future Claims" and establishes specific limitations in actions which involve the "good faith" by the employer. The statute reads as follows:

> ***(a) [N]o employer shall be subject to any liability or punishment*** for or on account of the failure of the employer to pay ... overtime compensation under the Fair Labor Standards Act of 1938 ... if he pleads and proves that the act or omission complained of was in ***good faith conformity with and in reliance on any written administrative regulation, ... any administrative practice, or enforcement policy ....*** ***Such a defense, if***

> ***established, shall be a bar to the action or proceeding .... 29 U.S.C. 251 Part III Future Claims - Section 10*** (emphasis added)

In the Secretary's complaint a cause of action for which relief was sought was identified. Pierce answered with a plea of "good faith" as one of his defenses, and established it when the district court found:

> [T]he employer intended to pay his employees on a "salary basis," intended to operate within the spirit and the letter of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable. *Findings of Fact, Conclusions of Law, Decision and Order* by Magistrate Judge Jack Sherman, Jr. on March 25, 1992.

The lower court rejected Pierce's claim that Section 259 established a limit to the jurisdiction of the district court in light of the finding of Pierce's "good faith" actions. Rather the court below affirmed the district court's ruling that Section 259 was merely a defense and not jurisdictional in nature. The 6th Circuit's decision in this action is contrary to previous rulings of the court and other circuits. In *Marshall v. Baptist Hospital, Inc.* 668 F.2d 234 (6th Cir. 1981) the court[7] stated:

> The District Court was correct in its observation that "(w)here the defense is established it acts to deprive the court of any

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[7] Circuit Judges Merritt and Kennedy were the judges on the *Marshall* case as well as on the panel reviewing the district court's decision in the Pierce case. Moreover, *Marshall* is neither factually nor legally distinguishable from the Pierce case.

> further jurisdiction, as is evidenced both by the language of section 259 itself, stating that the defense shall be a bar, and by the declared policy of the Portal to Portal Act to define and limit the jurisdiction of the courts. 29 U.S.C. s251(b)(3)." 473 F. Supp at 477.
> *Id* at p. 239.

Other circuits, in citing the *Marshall* decision, have supported the jurisdictional limitations established by Section 259 of the Act. In *Bouchard v. Regional Governing Board of Region V Mental Retardation Services*, 939 F.2d 1332 (8th Cir. 1991), while citing the 6th Circuits decision in *Marshall, supra*, the court decided:

> The § 259 defense is "jurisdictional in nature." ... our conclusion that [Appellants] established the defense as to each category of [employees] ends our inquiry. *Id* at p. 1334

And, the *Marshall* decision was cited again in *Quinn v. New York Electronic and Gas Corporation*, 621 F.Supp. 1086 (N.D. New York, 1985) when the court stated: "[a]t least one court has held that, once a Portal-to-Portal Act defense has been established, a court is deprived of any further jurisdiction . . . . The *Marshall* court based its ruling on the language of the statute itself, which states that, 'Such a defense, if established, shall be a bar to the action or proceeding . . . . *Id* at p. 1092.

Section 259 is a "bar to the action" and, once established, the complaint is precluded as a matter of law. The preclusive effect was also recognized by the 6th Circuit in the *Rogers Cartage Co. v. Reynolds*, 166 F.2d 317, 320-321 (6th Cir. 1948.)

> Section 11 of the Portal-to-Portal Act clothes the court with discretionary control over the item of liquidated damages; but §9 is mandatory and much broader in scope than §11. It provides that an employer shall not be "subject to any liability or punishment" for omission to comply with §207 of the Fair Labor Standards Act of 1938, as amended, if he pleads and proves that his omission was in good faith in conformity with and in reliance on any administrative regulation or ruling of any agency of the United States. It was pleaded and proved here that the appellant relied on the fact that it was subject to the jurisdiction of the Interstate Commerce Commission and that its omissions to comply with §207 of the Fair Labor Standards Act was in reliance upon the regulations, orders and rulings of the Interstate Commerce Commission.
>
> These circumstances, which were not controverted, were categorically found by the District Court. *The defense being established, under the statute it was a bar to the action. . .* . The ruling that the action is barred by the Portal-to-Portal Act compels reversal of the judgment below..... (italicize original, underlined added)

The Pierce case parallels the *Rogers Cartage Co. v. Reynolds* case in that the "good faith" defense was pleaded, and as found by the magistrate judge below, established. Thus "under the statute it was a bar to the action." For without an action, the court has no subject matter over which to have

jurisdiction, and as said in *Rogers Cartage Co. v. Reynolds* the "Portal-to-Portal Act compels reversal of the judgment below . . . . "

The lower court also recognized the "good faith" bar to "liability and punishment" in *Jackson v. Air Reduction Company*, 402 F.2d 521, (6th Cir. 1968), in which it stated:

> [I]t would be inequitable as well as **contrary to the law** to have the employer agree to adopt a change in its work schedule for the accommodation and personal convenience of its employees, and then permit the employees to force the company to pay a penalty for accommodating them .... *Id* at p. 524 (emphasis added).

The flextime work schedule that Pierce had adopted for his employees falls clearly within the parameters of *Air Reduction Company* as no benefit was derived for the company, other than happier employees. Flying model airplanes, playing golf, and going fishing were activities engaged in strictly for and by the personal convenience of the employees and their families.

The Pierce case is a classical example of the need of the Portal-to-Portal Act more than forty years after its enactment as the DOL is now attempting to usurp the power of Congress and in effect write legislation governing the Fair Labor Standards Act in a manner contrary to the Congressional plan. Two very pertinent quotes are found in the debate of the Act, as recorded in the *Congressional Record*, to provide a profound glimpse of congressional intentions with regard to the Act. The first explains the need

for the passage of the legislation, while the second expresses fear of the outcome should the courts not comply. During the Senate debate, Senator Hawkes stated:

> [U]nless he knows what his obligations are, no one can operate a business. In the absence of such knowledge I defy anyone on earth to tell me that he can conduct a business, maintain it, and keep it functioning for the benefit of the employees, the owners, and the general public. The very heart of the successful conduct of a business is knowledge of what one's obligations are, and success can not follow if a multitude of imaginary items may be brought forward at a late hour, when the owner or manager of a business thinks he is solvent, only to find, if he is legally bound under newly suggested obligations, that he is insolvent and out of business. That is not the United States of America.

Congressional Record - Senate, March 18, 1947, p.2179. The action taken by the Secretary against Pierce involves the "imaginary items" of wage liability for the employees taking time off from work in order to play golf, fly model airplanes, and go fishing. The "late hour" involves a ***new*** interpretation of a fifty year old phrase for which the DOL can not demonstrate any "enforcement policy or practice" prior to, or for four years subsequent to, the audit of Pierce's business operations. And finally, "... he is insolvent and out of business ..." is a prophetic view of precisely what has befallen Pierce due to the years of unnecessary litigation.

In the House debate, Congressman Vorys expressed his expectations, but tempered his remarks with a very noteworthy concern:

> If this bill is interpreted by the courts according to recognized principles of American jurisprudence, the threat of portal to portal suits to our economy will be over; businessmen can face their future problems knowing that no unforeseen liability will be created for past wages ....
>
> One danger remains. Will the courts that created this situation through invasion of the legislative field, construe this law as it should, or will the Supreme Court once more attempt to usurp the powers of Congress by rewritting the new law? At this time we can only hope that the courts will return once more to the judicial process that won them the respect of our people. If the courts once more throw this situation into turmoil, we will be facing not only a threat to our economy but to constitutional government. If such a threat should arise, we still have the machinery under our Constitution to protect the independence of the three branches of government in our Republic. I have faith, however, that the Gwynne bill will be interpreted in such a way that it will mark the end of the assault on our economy and the lawmaking power of Congress which is involved in the portal-to-portal cases.
>
> *Congressional Record - House*, February 27, 1947, p. 1514.

The two quotations clearly provide a historical understanding of Congressional intents and purposes when debating and enacting the Portal-to-Portal Act.

III.

Whether fraud committed by an officer of the court is covered under Rule 60(b)(3) or 60(b)(6) of the Federal Rules of Civil Procedure.

The court dismissed Pierce's argument that Counsel for the Secretary committed fraud upon the court during the proceedings of this case and are the "exceptional circumstances" that are recognized by Rule 60(b)(6), by stating that the allegation of "fraud" must be raised under Rule 60(b)(3) and must be filed within one year of the underlying judgment. The court has overlooked the fact that Rule 60(b)(3) covers fraud or other misconduct of a party; whereas, Rule 60(b)(6) involves the allegation of fraud committed specifically by "an officer of the court" for the purpose of "subverting the integrity of the court" or "so that the judicial machinery cannot perform in its impartial task of adjudging cases that are presented for adjudication."

The inclusion of "fraud on the court" in Rule 60(b)(6), is well documented within *Wright and Miller's Federal Practice and Procedure* §2870 at pp. 409 & 414. in which it states:

> The power to vacate a judgment that has been obtained by fraud upon the court is inherent in courts. Indeed even the Tax Court, which has a strong statutory policy of finality of judgments recognizes this inherent power, on the theory that "a decision

> produced by fraud on the court is not in essence a decision at all and never becomes final. *See, Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, (7th Cir. 1968).

and,

> Since the power to vacate a judgment for fraud on the court is so great, and so free from procedural limitations, it is important to know what kind of conduct falls into this category. A number of courts have accepted the suggestion of a distinguished commentator that "fraud upon the court" is fraud that "does or attempts to, subvert the integrity of the court itself,' or that is "perpetrated by officers of the court so that the judicial machinery cannot perform in its impartial task of adjudging cases that are presented for adjudication." (Emphasis added.)

The landmark decision with regard to the issue of "fraud upon the court" was *Hazel-Atlas Glass Co. v. Hartman - Ford - Empire Co.*, 322 U.S. 997 (1944), when nine years after a judgment was entered, this Court vacated the original judgment. In the decision, the Court stated: "[f]rom the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. " *Id* at p.1000.

In *Chambers v. NASCO*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed .2d 27 (1991), the Court ruled that the Federal Judiciary has inherent power to vacate its own judgment upon proof that fraud has been perpetrated upon the court. The decision also established some criteria as to

what may constitute "fraud upon the court," which included, "... (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce [Appellant] to exhausted compliance." Id at p. 2126.

The "false" pleadings in this action involve the insistence of "willful and purposeful" violations in the complaint and all court ordered meetings and hearings, along with the knowledge that the hours involved in the conflict were not "principal activities" covered by the FLSA due to the exemptions outlined in the Portal-to-Portal Act. Furthermore, counsel for the Secretary had knowledge from the beginning that no written or non-written agreement, or industry practice, covered compensation for time spent by employees flying model airplanes, golf, and/or fishing prior to the start, or upon the conclusion, of their "principal activities."

After maintaining throughout the entire procedural history of this case that the actions involved in the complaint where covered by various sections of the FLSA, the Secretary finally acknowledged in a memorandum to the court (while responding to Pierces Motion to Vacate the Judgment and Dismiss for Lack of Subject Matter Jurisdiction) that the time in question was for employees pursuit of recreational activities and "totally unrelated to their principal activities." All the while knowing that a prior acknowledgment in the district court or subsequent appeals would have been fatal to the complaint and have caused the case to be dismissed due to the limitations set forth in the Portal-to-Portal Act.

The "frivolous" pleadings and the "harassment" in this action are contained in the complaint filed by the Secretary which claimed that Pierces actions were a "willful and

purposeful" violation of the FLSA and warranted the award of liquidated damages. The claim was made in spite of the facts of the case wherein the Secretary charged that Pierce had improperly withheld approximately $3500 in compensation, yet acknowledged that the same employees had received overpayments of nearly $40,000 during the same time frame when none were required. The Secretary maintained the claim of "willful and purposeful" violations throughout the three years leading up to the trial and during the court ordered mediation hearings in order to unduly influence and prejudice the court, and harass Pierce[8]. Only immediately prior to the opening statements at the trial did the Secretary withdraw the "willful and purposeful" violation claim which he knew could not be supported[9].

Further "fraud upon the court" was committed by counsel for the Secretary, an officer of the court, when during the audit of Pierces operations and for four years subsequent to the filing of the complaint, including mediation hearings and trial, the Secretary had knowledge of the fact that the Department of Labor's own compensation practices towards its own compliance officers were in violation with regard to the precise "salary basis" test within the regulation for which he was attempting to hold Pierce accountable. The internal agency practice was in spite of the 1974 Amendment which brought all government employees (with the exception of

[8] It should be noted that on three occasions during court ordered mediation hearings and other proceedings, Pierce offered to pay the $3500 to settle the case, but the Secretary refused to accept the offer and continued the demand of "liquidated damages" for "willful and purposeful" violations.

[9] The magnitude of the harassment was the continual demand for liquidated damages due to the claimed "willful and purposeful" violations, which raised the "liability and punishment" to nearly $50,000 for approximately 105 hours, amounting to $3500 when a select few employees took time to pursue recreational activities.

Congressional staff members) under the umbrella of the protection of the FLSA with the expectation that no distinction would be made between public and private sector employees[10]. As stated in Pierce's appeal briefs to the court below, and the district court, many circuits have taken a dim view of the "do as I say, not as I do" practices of federal agencies, and some have rendered some polices void due to the agency's actions[11].

The Secretary's admission in the memorandum to the lower court last year, nearly five years after the trial, that the time covered by the complaint was for time spent "totally unrelated to the employees principal activities" constitutes his

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[10] The following passage was printed in the Federal Register by the Department of Labor while explaining the legislative history of the FLSA application to public sector employees:

> In 1974, Congress extended coverage to all public sector employees, exempting only elected officials and their immediate staffs. It did so with the stated intent to cover virtually all public sector employees . . . . *Federal Register*, August 19, 1992, Vol. 57, No. 161, p.37667.

[11] Numerous circuits have held that an agency's enforcement against others of regulations it itself is in violation of is rendered invalid. See, e.g., *Gulf States Manufacturers, Inc., v. NLRB* 579 F.2d 1298, 1308 (5th Cir. 1978)("It is well settled that an Executive Agency of the Government is bound by its own regulations, and have the force and effect of law, and failure of an agency to follow its regulations renders its decision invalid."); *United States v. Newell*, 578 F.2d 827, 834 (9th Cir. 1978)("... federal courts will require federal agencies to abide by the agency's own regulations, even where the regulations are more generous than required by law. The purpose of this rule is to prevent unjust discrimination and denial of adequate notice of procedures by the agency in violation of due process."); *Fisby v. U.S. Dept. of Housing & Urban Development*, 755 F.2d 1052, 1055 (3rd Cir. 1985) ("Failure on the part of the agency to act in compliance with its own regulations is fatal to such action.")

fraud upon the court in that he knew that an earlier acknowledgment would be fatal to his complaint. Furthermore, the published accounts of the DOL being in violation of their own regulations to which all other employers were being held, certainly points to a situation where an officer of the court was prosecuting one class of employers while "looking in the other direction" as his own employer acted in the same fashion even though both were to be held to the same standards.

The lower courts decision that Pierce's claim of fraud is untimely raised, as it is not within the one year limitation established by Rule 60(b)(3), is in conflict with this Court's rulings and the Federal Rules of Civil Procedure. The actions of the Secretary's counsel meet each and every one of the criteria of "fraud upon the court" as outlined by this Court in *Chambers v. NASCO*, supra; and furthermore, the fraud committed by "an officer of the court" as defined by *Wright and Miller's Federal Procedure*. All of which has been established by this Court to fall within the purview of Federal Rules of Civil Procedure 60(b)(6).

CONCLUSION

The Portal-to-Portal Act provides a "bar to the action" with regard to the Appellee's suit against Pierce for "[golf, fishing, and flying model airplane] activities . . . [that] were performed away from and are totally unrelated to the employee's principle work", just as the appellant's suit was precluded in *Carter v. Panama Canal Company* when the employees activities of checking the assignment board and walking to their respective locomotives were determined to be "preliminary / postliminary" activities rather than the "principal activities" for which they were to receive compensation. Along with the Portal-to-Portal Act, justice

demands that an employer should not be "subject to any liability or punishment" for time in which an employee voluntarily absents him/herself for recreational pursuits during the course of the work day.

Justice further "compels" this court to vacate the judgment against Pierce just as this court was compelled to reverse the judgment in *Cartage v. Reynolds, supra* when it was determined that the Portal-to-Portal Act was a bar to an action against an employer acting in "good faith", and in *Marshall v. Baptist Hospital, Inc., supra* when the lower court stated that once a "good faith" defense is established the court any further jurisdiction. For if the Act says the pleading and establishment of "good faith" is a "bar to the action or proceeding" it must be exactly that - a bar which removes the cause of action and thereby removes the subject matter over which the court would have any jurisdiction at all. Once the "good faith" defense is pleaded and established, and the action or proceeding is barred by the Portal-to-Portal Act, what subject matter remains for the court to have jurisdiction over and deliver a ruling?

Accordingly, Pierce prays that the court will recognize that a grave injustice has occurred and that legal precedent exists for it to be righted. Otherwise an employer will have pleaded a defense of "good faith," established "good faith" actions through a ruling of a magistrate judge in the court below who said "[Pierce] intended to operate within the spirit and the letter of the Act, and sought to pay and treat his employees in a manner that was professional, considerate, and equitable", yet still be faced with a judgment against him, solely because the negative affects of the litigation had destroyed his business and personal financial status. The judgment subjecting him to "liability [and] punishment" which is in direct conflict with the "good faith" mandate handed

down by Congress in the Portal-to-Portal Act and supported through decisions of the 6th Circuit.

Justice will not be served if an employer can be operating in "good faith" with an agency's written regulations, administrative practices, and enforcement policies, unnecessarily compensating his employees for more than ten times the amount the agency says is due them, and providing them with a flexible work schedule so they could individually pursue personal recreational and family needs, yet still be faced with a judgment against him.

Pierce requests the Court issue a Writ of Certiorari to address the conflict within the 6th Circuit and others as to the intent of Congress in enacting the jurisdictional limits established in the Portal-to-Portal Act. And to distinguish the attributes of fraud "in general" and fraud committed by "an officer of the court" and whether such action fall under Federal Rule 60(b)(4) or 60(b)(6). Finally, Pierce prays that the Court will grant the Writ of Certiorari to resolve the conflict as to the courts' responsibilities in reviewing a post judgment challenge to the court's subject matter jurisdiction under Civil, Rule 12(h)(3).

Respectfully submitted,

William G. Pierce, P.E.
pro se
3011 Hampton Court
Maineville, Ohio 45039
(513) 677-5334

APPENDICES

APPENDIX A: Decision by the United States Court of Appeals, Sixth Circuit, Motion to Reconsider, July 18, 1997.

APPENDIX B: Decision by the United States Court of Appeals, Sixth Circuit, May 9, 1997.

APPENDIX C: Order in a Civil Case by United States District Court, Southern District of Ohio, Western Division, March 25, 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 96-3408

UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

PIERCE PROCESSING, INC.,
Defendant,
WILLIAM PIERCE,
Defendant-Appellant.

Decided July 18, 1997

BEFORE: MERRITT, KENNEDY, and BOGGS
Circuit Judges

William Pierce moves for reconsideration of this court's decision affirming a district court judgment that denied his "Motion to Vacate Judgment and Dismiss for Lack of Jurisdiction" filed under Fed. R. Civ. P. 12(b)(1) and 60(b)(4).

Pierce sought to vacate a judgment that had been rendered against him in 1993, for failing to pay overtime compensation to his employees as required by the Fair Labor Standards Act ("FLSA"). He filed his motion in 1996, arguing that the underlying judgment was void because the Portal-to-Portal Act of 1947 had deprived the district court of jurisdiction over the FLSA case. The district court denied his motion on March 25, 1996.

In affirming this judgment, we found that Pierce could not rely on Rule 12(b)(1) because his motion to vacate had been filed after the underlying judgment. We also found that the motion was properly denied under Rule 60(b)(4), as the jurisdictional limitations of the Portal-to-Portal Act only apply to FLSA claims that arose prior to May 14, 1947. *See* 29 U.S.C. § 252.

Pierce continues to argue that the district court lacked jurisdiction under §§ 254 and 259 of the Portal-to-Portal Act. In pertinent part, § 254 relieves an employer from liability if he shows that compensation has been sought for activities which were preliminary or postliminary to his employees principal activities. Section 259 relieves an employer from liability if he pleads and proves that he acted in good faith reliance on certain types of written information issued by the Wage and Hour Division. These sections do not provide a basis for relief under Rule 60(b)(4), because they do not limit the district court's jurisdiction to consider FLSA claims. Instead, they provide potential defenses to liability that are only available to an employer after the court exercises its jurisdiction and makes a determination that the claims involve excepted activities under § 254 or that the employer has acted in good faith under § 259.

Pierce also argues that he was entitled to relief under Fed. R. Civ. P. 60(b)(6), because the appellee committed a fraud upon the court by litigating the FLSA action against him when it knew that he was not liable because of these defenses. This argument is unavailing because an allegation of fraud must be raised under Rule 60(b)(3), rather than Rule 60(b)(6), and a Rule 60(b)(3) motion must be filed within one year of the underlying judgment.

Pierce has cited no misapprehension of law or fact that would alter our original decision. See Fed. R. App. P. 40(a).

Accordingly, the motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT
/s/ Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 96-3408

UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

PIERCE PROCESSING, INC.,
Defendant,
WILLIAM PIERCE,
Defendant-Appellant.

Decided May 09, 1997

BEFORE: MERRITT, KENNEDY, and BOGGS
Circuit Judges

William Pierce appeals pro se from a district court order that denied his "Motion to Vacate Judgment and Dismiss for Lack of Jurisdiction," filed under Fed. R. Civ. P. 12(b)(1), 12(h)(3) and 60(b)(4). His appeal has been referred to a panel of this court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, the panel unanimously agrees that oral argument is not needed in this case. Fed.R. App.P. 34(a).

Pierce sought to vacate a judgment that had been rendered against him for violating the overtime compensation provisions of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207(a)(1). He argued that the district court lacked jurisdiction over the underlying case, pursuant

top the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262. The court denied Pierce's motion to vacate on March 25, 1996, and he now appeals.

A motion to dismiss under Rule 12 must be decided before or at the time of trial. *See* Fed. R. Civ.2(d) Therefore, we construe Pierce's motion solely as a motion for relief from judgment under Rule 60(b). An appeal from denial of such a motion does not bring the underlying judgment up for review. *United States v. Grable*, 25 F.3d 298, 301-02 (6th Circuit. 1994).

Pierce specifically relied on Rule(b)(4), which provides relief when the underlying judgment is void. A judgment is void if the court that rendered it lacked subject matter jurisdiction. *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995).

The Portal-to-Portal Act does limit the courts' jurisdiction over FLSA claims. However, that jurisdictional limitation applies only to certain claims that are based on an employer's failure "to pay an employee minimum wages, or to pay an employee overtime compensation, *for or on account of any activity of an employee engaged in prior to May 14, 1947.*" 29 U.S.C. § 252 (emphasis added). This limitation does not apply here because the claims in the underlying case involved activities that Pierce's employees had engaged in after May 1, 1986.

Pierce also argued that the court lacked jurisdiction under Sections 254 and 259 of the Portal-to-Portal Act. These sections are applicable to claims that arose after May 14, 1947. However, the disputed sections merely create defenses to liability, rather than limitations on the jurisdiction of the courts. the district court clearly had jurisdiction to

consider the Secretary's FLSA claims under 29 U.S.C. §§ 216(c) and 217.

Pierce now argues that his motion should be construed under Rule 60(b)(6), which allows the district court to grant such a motion for "any other reason justifying relief from the operation of the judgment." The present case does not involve the kind of exceptional circumstances that mandate relief under Rule 60(b)(6), as it is based on no more than alleged mistakes of law that could have been raised under Rule 60(b)(1). See Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989).

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-89-15

ROBERT B. REICH, Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR
Plaintiff

vs.

PIERCE PROCESSING, INC. et al
Defendants.

[Filed March 25, 1996]

Order in a Civil Case

This is a consent case for which the Court entered judgment in favor of the Secretary, and against defendants, on February 9, 1993. Docs. 38,39. On appeal, the Court's decision was affirmed by the Sixth Circuit. Doc. 48. Certiorari, in the United States Supreme Court, was denied thereafter. Doc. 50. Now, three years after conclusion of the district court proceedings, defendants have filed a motion to vacate the judgment against them, or dismiss this action. See docs. 51 (motion), 52 (Secretary's opposition memorandum), 53 (defendants' reply). Because defendants appear pro se[1], the motion is construed liberally and in their favor[2]. Williams v. Browman, 981 F.2d 901, 903 (6th Cir. 1992) (per curiam).

[1] When first appearing before this Court, i.e., prior to their Sixth Circuit appeal, defendants were represented by counsel. See, e.g., doc. 3 (answer filed by counsel).

Even when so construed, there is little question that the motion is untimely filed, and thus procedurally defective. For example, the time deadlines for filing Rule 59(e) motions to alter or amend a judgment, and Rule 60(b) motions for relief from judgment, have both long since passed. See Fed. R. Civ. P. 59(e) (establishing a ten-day post-judgment filing deadline); Fed.R. Civ. P. 60(b) (requiring the filing be made within a "reasonable" time and/or one year of entry of judgment). Also passed is the dispositive motions deadline. Pursuant to that deadline, defendants had until July 6, 1991 - or approximately two-and-a-half years after the January 1989 complaint filing, a more than reasonable time - in which to raise their dismissal arguments. Doc. 12. No motion to dismiss was filed, however.[3]

In the alternative, even if the Court assumes, arguendo, that it is required, for some reason, to reach the merits of defendants' motion, the Court finds, after careful consideration, no justifiable grounds for the relief requested there.

Defendants' motion to vacate or dismiss is therefore DENIED.

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[2] As a pro se litigant, defendant William G. Pierce may represent just his own legal interests, and not also those of the corporate co-defendant, Pierce Processing, Inc. See doc 48 (Sixth Circuit slip opinion) at 3 n.1 (citing Doherty v. American Motors Corp., 728 F.2d 334, 340 (6th Cir. 1984)). Thus, the only arguments before the Court are those made by Pierce himself. Id.

[3] In so noting, the Court is not suggesting that defendants' counsel erred by not filing a motion to dismiss. In fact, quite the opposite is true; defendants were well represented here, as reflected by the fact that, earlier in the litigation, judgment was conditionally entered in their favor. Doc. 29 at 10.

IT IS SO ORDERED.

/s/ Jack Sherman, Jr.
Jack Sherman, Jr.
United States Magistrate Judge